IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

SA.No. 817 of 1993()

AS.107/1991 of DISTRICT COURT, THRISSUR
OS.573/1986 of PRL.MUNSIFF COURT,THRISSUR DT.8.4.1991

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APPELLANT: APPELLANT / PLAINTIFF

CHATHUNNY,
S/O.KARIATTUKARAKARAN KRISHNAN,
KARIATTUKARA DESOM,
ARANATTUKARA VILLAGE,
THRISSUR TALUK.

BY ADV. SRI.N.P.SAMUEL

RESPONDENT: RESPONDENT/ DEFENDANT

THRISSUR MUNICIPALITY,
REP.BY THE MUNICIPAL COMMISSIONER,
THRISSUR.

BY ADV. SRI.K.B.MOHANDAS,SC,THRISSUR CORPORATION
SMT.LINY ANTONY
SRI.K.A.SREEJITH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13 / 06/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 817 OF 1993

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DATED THIS THE 13th DAY OF JUNE, 2007

JUDGMENT

Plaintiff in O.S.573 of 1986 on the file of Munsiff Court, Thrissur is the appellant. Respondent is the defendant Municipality. Appellant instituted the suit seeking a decree for permanent prohibitory injunction restraining respondent Municipality from interfering with his peaceful possession of the plaint schedule property or taking any action pursuant to Ext.A3 and A6 notice. The case of the appellant was that plaint schedule property having a total extent of 27.25 cents in R.S.No.637/2 of Aranattukara Village was purchased by him under Ext.A1 document of 1113 ME and while he has been in possession of the property, 12 cents of that property was transferred under Ext.A2 in 1968 in favour of his brother Kumaran and as Kumaran was not in station, appellant has been in possession of the same also and while he has been in possession of the property, respondent Municipality claimed that plaint C schedule property which is a portion of plaint A and B schedule properties belong to the Municipality and therefore threatened to take possession of the C schedule property and

issued Ext.A3 notice for which Ext.A4 reply was sent and even thereafter Municipality sent Ext.A6 notice and therefore respondent is to be restrained by a permanent prohibitory injunction. Respondent filed a written statement contending that the plaint C schedule property does not form part of the property belonging to the appellant under Ext.A1 and it is a land belonging to the Municipality and plaint C schedule property was trespassed upon by the appellant unauthorisedly and Municipality is entitled to take possession of the same and in spite of Ext.A3 notice, appellant did not surrender possession of the property and therefore Surveyor was authorised to remove the encroachment and appellant is not entitled to the decree sought for.

2. Learned Munsiff framed the necessary issues. On the evidence of Pws 1 to 3 and DW1 and Exts.A1 and A7, B1 and C1, learned Munsiff held that appellant did not seek a decree for declaration of his right and title to the plaint C schedule property. Learned Munsiff also found that the property claimed by appellant under Ext.A1 is in Survey No.1132 and plaint schedule property is in Survey No.1129 and 1131 and appellant cannot claim any right to the said property and is therefore not

entitled to the decree sought for. The suit was dismissed. Appellant challenged the decree and judgment before District Court, Thrissur in A.S.107/1991. Learned District Judge, on reappreciation of evidence, confirmed the decree passed by the trial court and dismissed the appeal. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1)When there is discrepancy between the extent shown in the document and it is enclosed by well defined old boundaries will not the boundaries prevail.

2)When the appellant has established his possession and enjoyment of the property, is not the appellant entitled to the decree for injunction as sought for.

4. Learned counsel appearing for appellant vehemently argued that courts below did not properly appreciate the evidence. It was argued that under Ext.A1 appellant obtained the property and though under Ext.A2, 12 cents of the property was sold in favour of his brother, appellant continued to be in possession of the property as the brother was also not in station and plaint C schedule property is not the property of the

Municipality and in such circumstances Municipality is not entitled to take possession of the plaint C schedule property and courts below should have granted the decree sought for. It was argued that Ext.C1 report shows that when the Commissioner inspected the property, there was survey stones on all the four corners of the plaint schedule property which establish that the property which lies between the boundaries is in the possession of the appellant and Ext.C1 report shows that the age of the boundary fence and the trees as more than forty years and in such circumstances even if the Municipality has any right over the property, that right has been lost by adverse possession and limitation and appellant is entitled the decree sought for.

5. Learned counsel appearing for respondent argued that both the courts have properly appreciated the evidence and factual finding cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure. Though it was vehemently argued that in the light of the boundaries shown in Ext.A1, courts below should not have given undue importance to Survey Number and as plaint schedule property forms part of the property enclosed within the survey boundary courts below should have upheld the claim of the appellant that

he has been in possession of the property under Ext.A1 as found by the courts below, appellant did not seek a decree for declaration of his title. The suit was instituted as a mere suit for permanent prohibitory injunction on the strength of his possession. Even in the plaint it was admitted that respondent Municipality is claiming that a portion of the plaint A and B schedule property viz, plaint C schedule property is the property of the Municipality. It was contended by appellant in the plaint itself that even if respondent has title to the plaint schedule property it is barred by adverse possession and limitation. But appellant did not seek a decree for declaration of his title to the property either under Ext.A1 title deed or on the title perfected by adverse possession.

6. In such circumstances, the question is whether appellant is entitled to get a decree restraining the Municipality from proceeding further pursuant to Ext.A4 and A6 notices issued therein. If plaint schedule property is the property belonging to the Municipality and is in unauthorised occupation of the appellant, it cannot be disputed that Municipalities Act enables the officers of the Municipality to issue notice and to take possession of the property belonging to the Municipality in

accordance with the rules. In such circumstances, appellant is not entitled to get a decree for permanent prohibitory injunction restraining respondent Municipality from invoking the powers under the Municipalities Act. If at all appellant should have instituted the suit for declaration of his title, either title under Ext.A2 or title perfected by adverse possession. Without seeking such a decree appellant is not entitled to the decree for permanent prohibitory injunction. For that reason the concurrent finding of the courts below that appellant is not entitled to the decree for permanent prohibitory injunction warrants no interference. The Second appeal is dismissed. It is made clear that dismissal of this suit will not affect the rights of the appellant to seek a decree on the strength of title.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.NO.817/93

JUDGMENT

13th JUNE, 2007